Filed 7/30/19 P. v. Le CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. THANH CHI LE, Defendant and Appellant.	G055795 (Super. Ct. No. 17WF0639) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Annie

Featherman Fraser and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Thanh Chi Le appeals from the judgment following his conviction on one count of assault with a deadly weapon. Le slashed his neighbor's forearm with a knife, causing serious injury, when the neighbor attempted to help Le up after he had fallen out of his wheelchair during a confrontation.

Le contends the trial court erred when it failed to instruct the jury on "defense of property" because there was substantial evidence from which the jury could have concluded that Le used his knife to prevent the neighbor from stealing his flashlight.

We disagree. While there was evidence the neighbor tried to take Le's flashlight the night before the assault, there was no substantial evidence to suggest Le believed his neighbor was seeking to take the flashlight from him at that time Le slashed him with the knife. We therefore affirm the judgment.

FACTS

One evening in March of 2017, Le was on the sidewalk in his neighborhood. He was sitting on his motorized three-wheeled scooter yelling profanities—apparently directed at people in his own residence—and also shining a flashlight into the bedroom window of his neighbor, Greg C.

Greg went outside and asked Le to stop flashing the light. Le responded "Fuck you," and flashed the light directly into Greg's face. Greg asked him to stop; he then walked closer to Le and warned him that if he did not stop flashing the light, he would take it away. Le was not deterred, so Greg grabbed the front end of the flashlight and attempted to take it from him. When Le resisted, Greg let go of the flashlight, which caused Le to lose his balance and fall off his scooter.

Greg offered to help Le get up, but Le kept swinging the flashlight towards him in an apparent attempt to keep him away. Greg ran back inside his home to get his mother. When the two of them returned, they unsuccessfully attempted to help Le. They then rang a neighbor's doorbell and advised the occupant regarding the situation.[1]

At about 5:30 a.m. the following morning, Greg again noticed a bright light flashing into his home. He went outside and once again saw Le, sitting in his scooter at the edge of Greg's driveway, aiming a flashlight into Greg's home. Greg told Le to turn off the flashlight; Le responded, "Fuck you" and flashed his flashlight into Greg's face. Greg walked quickly down the steps in the front of his house, and Le began to back up his scooter.

As he approached Le, Greg made what he described as a "juke" move, meaning he suddenly dropped his upper body so he looked like he was about to run and then stopped. Le reacted by trying to quickly turn his scooter, which caused it to topple over in the street. Greg then turned and walked back into his house.

When Greg came back outside about five minutes later to take out the trash, he saw Le and his scooter were still on the ground. Greg walked over to Le with his hands upraised in an attempt to signal he intended no harm, and said "Look, I know you need some help. I'm not going to leave you like this. I'm not going to hurt you. Let me help you."[2]

---

[1] It is not clear from the record whether the house where they rang the doorbell was Le's own residence.

[2] A police officer testified he interviewed Greg while he was at the hospital. Greg told the officer that right before the assault, when he walked up to Le, he put out his hand to signify he was willing to help, but Le responded something like, "no no no." Greg asked Le if he was all right, and Le said, "No, get away." Greg got closer, put out his hand, and then Le cut him.

Le was not shining his flashlight at Greg by that point, and Greg testified he did not see the flashlight when he approached Le to help him up. Le did not respond to Greg's offer of help.

As Greg extended his hand toward Le, Le slashed his arm with a knife. Greg had not seen the knife, and initially believed Le had merely swatted at him with his hand, until he realized his arm was wet with blood. Greg asked Le why he had cut him, and then ran back into his house for help. Greg yelled for his parents to take him to the hospital. When Greg went back outside to get into the car, Le was still lying in the street, watching him and grinning. Before leaving the scene, Greg tried to notify someone at Le's house that he was lying in the street and needed help.[3]

As Greg and his mother left for the hospital, Garden Grove Police officers were called to the scene. They found Le and his scooter still toppled over in the street; the bloody knife was clipped to Le's belt. They noted a trail of blood drops between the spot where Le was lying on the ground and Greg's house.

Greg's wound was substantial, with pulsatile bleeding consistent with an arterial injury. It required multiple stitches, and Greg missed a week of work as a consequence of the injury.

Le was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1); the information also alleged he had inflicted great bodily injury on Greg.

At trial, the court instructed the jury regarding Le's right to use self-defense, including that he would be acting in lawful self-defense if (1) he reasonably believed he was in imminent danger of being touched unlawfully, and (2) he used no

---

[3] There was a videotape, from a surveillance camera at Le's residence that showed both the assault and Greg's subsequent efforts to notify someone at the residence that Le was in the street.

more force than a reasonable person would believe was necessary to defend himself against that unlawful touching.

The court refused to separately instruct the jury on Le's right to defend his property, rejecting defense counsel's claim that there was "circumstantial evidence . . . that Mr. Le had felt that he needed to protect his property considering that the night before [Greg] tried to grab his flashlight, and then on this date of March 17, [Greg] said he saw him with a flashlight and was approaching him."

The jury convicted Le on the charge of assault with a deadly weapon, and found true the allegation that he had inflicted great bodily injury. The court refused to reduce the charge to a misdemeanor, explaining that Le "was armed with a deadly weapon at the time of the offense," which was "carried out with some sophistication and planning." The court noted "[i]t was apparent through the testimony that [Le] was planning on doing what he did if [Greg] approached him. His violent conduct is a danger to society."

Nonetheless, the court declined to further incarcerate Le, instead placing him on five years' formal probation and giving him credit for time served in county jail. In doing so, the court cited the "unusual circumstance . . . that [Le] is confined to a wheelchair, he's 65 years old with no significant record. Also that . . . the crime was committed because there is some mental condition, not amounting to a defense, but there's a high likelihood that [Le] would respond favorably to mental health treatment if he was on probation or a condition of probation."

DISCUSSION

Le's sole contention on appeal is the court erred by refusing to instruct the jury about his right to engage in the lawful defense of his property, in addition to his right of self-defense. Specifically, he contends "[t]here was substantial evidence that [Le] acted to prevent Greg from taking his flashlight" because "[t]he night before, Greg tried

to take [the] flashlight" and consequently "it was reasonable for [Le] to believe that Greg was going to take his flashlight [again]."

Le asserts the court has "an obligation to instruct on a defense that the defendant is relying on or a defense that is supported by substantial evidence and is not inconsistent with the defendant's theory of the case." (Citing *People v. San Nicolas* (2004) 34 Cal.4th 614, 669; and *People v. Maury* (2003) 30 Cal.4th 342, 424.) He also acknowledges that the court has no duty to instruct on a defense if "the supporting evidence is minimal and insubstantial." (Citing *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 ["the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. Doubts as to the sufficiency of the evidence should be resolved in the accused's favor"].)

We apply a de novo standard in reviewing a claim that the court erred in failing to give a required jury instruction. (*People v. Simon* (2016) 1 Cal.5th 98, 133 ["We review de novo a trial court's decision not to give an imperfect self-defense instruction"]; *People v. Posey* (2004) 32 Cal.4th 193, 218 ["The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citations] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration"].) We find no error here.

CALCRIM No. 3476 is the standard instruction defining a person's right to use reasonable force in the defense of property. It states, in pertinent part, that "The owner [or possessor] of . . . property may use reasonable force to protect that property from imminent harm. . . . [¶] *Reasonable force* means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm. [¶] When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would

have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." (See, Civ. Code, § 50.)

Under the circumstances, Greg's attempt to take Le's flashlight from him on the night before the assault might support an inference Le was concerned Greg would try to take it again the next morning, but there is no evidence here to suggest Le believed Greg *was actually* attempting to take the flashlight when he slashed him. Specifically, while it is undisputed Le had the flashlight in his hand when Greg first came out of his house to confront him on the morning of the assault, there is no evidence Le was still holding onto the flashlight after he toppled off his scooter into the street.

Indeed, the evidence is to the contrary. When Greg returned five minutes later, and saw that Le was still in the street, Le was no longer shining his flashlight. And when Greg approached Le to help him get up, Greg did not see the flashlight. Thus, there is no evidence suggesting that when Greg reached his hand toward Le, he was reaching anywhere near—or even in the direction of—Le's flashlight. Absent such evidence, there is no basis to infer that when Le stabbed Greg he reasonably believed Greg was engaged in an attempt to take his flashlight.

Le argues the evidence supports the theory that Greg actually succeeded in stealing his flashlight because "when the [police] officers searched the area, they did not find [his] flashlight . . . , which suggests that Greg took it." This claim misstates the evidence. Neither of the two police officers who testified at trial stated they had engaged in any search for the flashlight, and both officers denied any recollection of whether Le had one in his possession when they encountered him. Indeed, the only evidence Le cites in support of his contention actually contradicts it: In response to defense counsel's question "Did you find any flashlight in my client's possession," Officer Coopman testified: "I was not looking for one. I don't recall if there was one present."

Because there is no substantial evidence that Le still had the flashlight when he slashed Greg, we conclude there was insufficient evidence to support the conclusion that Le reasonably believed Greg was attempting to steal the flashlight when he approached Le and reached out for his hand. We consequently find no error in the trial court's refusal to instruct the jury on Le's right to engage in defense of his property.

But even if the scant evidence presented were sufficient to support giving the defense of property instruction, we would conclude there was no reasonable possibility the error might have contributed to the verdict. (*Chapman v. State of California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824 [When there is "'a reasonable possibility'" that the error might have contributed to the verdict, reversal is required].)

The trial court did instruct the jury about Le's right to self-defense—an instruction which broadly defined Le's right to use reasonable force in response to the perceived danger of being "touched" unlawfully by Greg. Since it is undisputed that Greg *was* trying to touch Le at the time he was slashed, the jury's rejection of the self-defense theory necessarily rested on the perceived insufficiency of the evidence to support either: (1) a finding that Le believed Greg was acting *unlawfully* in trying to touch him; or (2) a finding that Le's use of the knife was a reasonable response to that unlawful touching. Either way, the jury's analysis would have encompassed the scenario in which Greg's attempt to touch Le was for the *specific* unlawful purpose of taking his flashlight. We consequently conclude there is no reasonable possibility the same jury that rejected Le's self-defense theory would have been persuaded by the theory he was acting to defend his flashlight.

DISPOSITION

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.